

1 John Furlong, Bar No. 018356
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236
7 John.Furlong@staff.azbar.org

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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:
12 **(AMENDED) PETITION TO**
13 **AMEND RULE 23 OF THE**
14 **ARIZONA RULES OF CIVIL**
15 **PROCEDURE**

Supreme Court No. R-15-0007

16 **COMMENT OF**
17 **THE STATE BAR OF ARIZONA**

18 The State Bar of Arizona writes in support of the Amended Petition of the
19 Arizona Foundation for Legal Services and Education (“the Foundation”) to amend
20 Arizona Rule of Civil Procedure 23 to add a section (g) concerning *cy pres*. On
21 January 8, 2015, the Foundation filed a Petition to Amend Rule 23 of the Arizona
22 Rule of Civil Procedure (No. R-15-0007, “the Petition”). The Petition proposed to
23 add a section (g) to Rule 23 that would emphasize the possibility of disbursing
24 residual class action funds to the Foundation. On February 25, 2015, the Foundation
25 filed an Amended Petition to Amend Rule 23, Arizona Rules of Civil Procedure, that
26 further refined the Foundation’s proposed change to Rule 23 (“the Amended
27 Petition”) by clarifying that the Foundation would receive those funds in its role “to
28 administer in support of projects promoting access to the justice system and the
delivery of legal services for low-income residents of Arizona or such related projects
as directed by the court.” In light of the worthiness of the objectives of the change the
Petition seeks and the helpful clarifications in the Amended Petition that remove

1 questions some had about the Petition, the State Bar recommends adopting the
2 proposed change to Rule 23.

3 **Background**

4 The core of the Amended Petition is its proposal (at 1) to amend Rule 23 to
5 “provide discretion for the distribution of residual funds in class action cases” and to
6 “allow for any residual class action funds to be distributed to the Arizona Bar
7 Foundation to provide legal services and access to justice for low-income residents of
8 Arizona.” In sum, a trial court may allocate—though is not required to allocate—
9 some or all of residual funds from a class action settlement or judgment to the
10 Foundation. The proposed rule does not require such a distribution to the Foundation,
11 and the parties to a class action settlement may always designate a different recipient
12 of residual funds if they so choose.

13 The State Bar created the Foundation as a separate 501(c)(3) organization in
14 1978 with the mission of promoting access to justice for all Arizonans. While the
15 State Bar enthusiastically supports the efforts and work of the Foundation, as do so
16 many individual lawyers, the State Bar also supports the Amended Petition because
17 the proposed rule serves justice without effecting a modification of the substantive law
18 of *cy pres*, as some have incorrectly suggested. As explained below, the permissive
19 aspects of the proposal in the Amended Petition are important points that the State Bar
20 believes distinguish the current petition from a similar, unsuccessful effort last year.
21 Given that the Amended Petition eliminates the mandatory aspects of the proposal the
22 Supreme Court rejected last year, the State Bar believes that reevaluating—and
23 ultimately approving—this narrower revision is appropriate.

24 **I. THE PETITION ADDRESSES THE ACUTE NEED FOR FUNDING** 25 **LEGAL SERVICES IN ARIZONA, AND WOULD SITUATE ARIZONA** 26 **IN THE MAINSTREAM OF AN EMERGING LEGAL REFORM.**

27 As the Petition correctly explains, funding for legal services programs has come
28 under extraordinary pressure since the onset of the Great Recession. One cause of that
funding pressure is reduced expenditures by the Legal Services Corporation (“LSC”).

1 Federal funding from LSC declined precipitously in recent years, making it very
2 difficult for legal services organizations throughout Arizona. By way of example
3 only, LSC's nationwide funding decreased approximately 24 percent from 2010 to
4 2013 (measured in constant 2013 dollars).
5 [<http://www.lsc.gov/congress/funding/funding-history>]

6 A second cause is that funds from Interest on Lawyers' Trust Accounts
7 ("IOLTA") have decreased dramatically since the recession began in the third quarter
8 of 2008. Like savings accounts, interest on IOLTA funds has been less than one
9 percent since October 2008. For example, the federal funds rate in October 2008 was
10 0.97 percent, declined over the years, and now stands at 0.11 percent.
11 [[http://www.federalreserve.gov/releases/h15/](http://www.federalreserve.gov/releases/h15/data.htm) data.htm (select "Federal Funds
12 (effective)")] While not an exact proxy for interest rates on IOLTA funds, those
13 federal funds data give a clear perspective of how difficult it is to generate meaningful
14 revenue for legal services organizations from IOLTA.

15 The extraordinary need for legal services and the precipitous decline in funding
16 are unquestioned, so the partial solution proposed by the petition should not be
17 controversial. As the Petition and its appendices explain, one-third of the states now
18 use court rules or statutes to direct residual class action settlement funds to legal
19 services organizations. Indeed, many of those states *require* using residual funds for
20 such purposes. And it is important that 14 of the 17 states have implemented this type
21 of alternative funding solution since 2008—the onset of the Great Recession and the
22 concomitant crisis in legal services funding. It is no exaggeration to describe this as a
23 rapid, dramatic, and widely-accepted development in the law. Considering the
24 number of states making this change in only the past seven years, it is plain that
25 Arizona considers this innovation with respect to *cy pres* funds at an appropriate time.
26 Simply put, adopting this rule change would put Arizona squarely in the mainstream
27 of jurisdictions recognizing a legal principle that observers almost uniformly expect to
28 expand and garner even wider acceptance.

1 **II. THE AMENDED PETITION'S LANGUAGE MODIFYING THE**
2 **PETITION'S PROPOSED RULE 23(G)(2) PROVIDES IMPORTANT**
3 **CLARITY.**

4 The Amended Petition meaningfully clarifies the Foundation's role by
5 highlighting that a trial court's direction of residual class funds to the Foundation is
6 truly discretionary. The Foundation's Amended Petition provides that helpful
7 clarification in the following modification to its original language for a new Rule
8 23(g)(2):

9 Any order entering a judgment or approving a proposed compromise
10 or settlement of a class action certified under this rule that establishes
11 a process for identifying and compensating members of the class, or
12 where such process is impossible or economically impractical, may
13 provide for the disbursement of residual funds. In matters where
14 residual funds remain, the residual funds may be disbursed to the
15 Arizona Foundation for Legal Services and Education ~~to provide legal~~
16 ~~services and access to the justice system for low-income residents of~~
Arizona to administer in support of projects promoting access to the
justice system and the delivery of legal services for low-income
residents of Arizona or such related projects as directed by the Court.

17 [Amended Petition at 3]

18 This amendment is useful because it clarifies the Foundation's role. As it
19 makes clear, the Foundation does not provide legal services directly. Instead, it
20 receives funds generated by IOLTA, state and federal grants, and other sources and
21 then makes grants to carefully vetted and approved legal services providers. The
22 Foundation monitors how those providers use the funds through audits, and it reports
23 on those uses. The Foundation also enhances access to justice through education
24 efforts, such as self-help websites with more than 700,000 unique visitors each year
25 and training for educators and public groups.

26 This amendment is also helpful because it underscores the discretion at the
27 heart of the approach to *cy pres* funds that it embodies. First, as was true in the
28 Petition (and was not true in the rule change petition the Foundation supported

1 unsuccessfully last year), the Amended Petition’s proposal merely underscores to trial
2 courts that they are free to designate the Foundation as a recipient of residual class
3 action funds. It does not require that the Foundation receive funds, setting it apart
4 from mandatory rules other states have adopted. *Contra* Conn. Super. Ct. R. 9-9(g)(2)
5 (absent designation, residual funds “shall be disbursed” to legal services
6 organization); Ind. R. Civ. P. 23(f)(2) (25% of residual funds must go to legal services
7 organizations); Ky. R. Civ. P. 23.05(6)(b) (25% of residual funds must go to legal
8 services fund); Mont. R. Civ. P. 23(i)(3) (50% of residual funds must go to legal
9 services organization); Pa. R. Civ. P. 1706(b) (50% of residual funds must go to legal
10 services organization); S.D. Codified Laws § 16-2-57 (residual funds must go to legal
11 services organization); Wash. R. Civ. P. 23(f)(2) (25% of residual funds must go to
12 legal services organization). Second, the Amended Petition clarifies that the
13 Foundation will use any residual funds it receives in accordance with the trial court’s
14 directions. [Amended Petition at 3] This is another check to ensure that the funds go
15 toward a purpose that aligns as closely as possible with the underlying goals of the
16 class action, as is true in the current law of *cy pres*. Third, it remains true under the
17 Amended Petition’s proposal that the parties in a class action settlement are free to
18 designate recipients of their choice to receive residual funds—another level of
19 discretion in current law the Amended Petition leaves intact. *See, e.g., Custom LED,*
20 *LLC v. eBay, Inc.*, 2014 U.S. Dist. LEXIS 87180, *7 (N.D. Cal. June 24, 2014)
21 (approving federal class action settlement with *cy pres* disbursements to National
22 Cyber-Forensics & Training Alliance and to National Consumer Law Center). In all
23 of these ways, the amendment should dispel any perception that the proposed rule
24 amendment represents improper favoritism of an entity that, though a 501(c)(3)
25 organization separate from the State Bar, the State Bar long ago formed.

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2 **III. THE PROPOSED AMENDMENT PERMISSIBLY MODIFIES A RULE**
3 **OF JUDICIAL CONSTRUCTION—IT DOES NOT ALTER THE**
4 **SUBSTANTIVE LAW.**

5 The State Bar also supports the Amended Petition because it believes that
6 criticisms of it are ultimately incorrect.

7 First, while some members of the Bar are concerned that the proposed rule
8 amendment alters a substantive aspect of the law, making legislation the appropriate
9 vehicle to effect any such change, the State Bar believes that concern is misplaced for
10 multiple reasons. For one thing, class actions are judicial creations; “[e]quity courts
11 created class action procedures to manage group litigation fairly and efficiently.”
12 Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, FOURTH § 21, at 243
13 (2004). The 1966 amendments to Federal Rule of Civil Procedure 23 then gave rise to
14 damages class actions. Similarly, it is widely recognized that “[c]y pres is an
15 equitable doctrine with roots in trusts and estates law” William B. Rubenstein, *et*
16 *al.*, NEWBERG ON CLASS ACTIONS § 12:32, at 238 (5th ed. 2014). *Cy pres* is a rule of
17 judicial construction “that written instruments should be construed as near to the
18 parties’ intention as possible” Bryan A. Garner, GARNER’S DICTIONARY OF
19 LEGAL USAGE 241 (3d ed. 2011). Because this is a judicially-created device, there is
20 no impediment to modifying it through a procedural rule that this Court adopts. In
21 explaining that a number of jurisdictions have similar rules or statutes, the leading
22 class action treatise noted, “Providing legal services for the indigent is surely a worthy
23 goal, so much so that one wonders why all unclaimed class action funds are not
24 simply shifted to that end.” NEWBERG ON CLASS ACTIONS § 12:35, at 268. At
25 bottom, the criticism also fails because the Amended Petition makes clear that it is not
26 effecting a substantive change to the law of *cy pres*. The trial court retains complete
27 discretion to designate recipients of residual funds as it deems appropriate. Where
28 designation to the Foundation would not further the purposes of the class action suit
and its resolution, the trial court can do justice as it sees fit. This is no change in the

1 law at all.

2 Second, the State Bar also is aware that some members are concerned that the
3 proposed rule change focuses exclusively on providing access to justice for low-
4 income residents, but that purpose does not necessarily align with the purpose of Rule
5 23(b)(3) class actions generally. Under this view, the class action device is a
6 procedural tool designed to make it feasible to pursue claims that would otherwise be
7 economically infeasible because of the small damages at issue. The State Bar
8 appreciates the sincerity of this view but believes it is erroneous. Rather than focusing
9 on *who* benefits from the Foundation's work, it is more appropriate to focus *what* that
10 work does. That is, the Foundation facilitates access to justice when it otherwise
11 would not exist. In that respect, the underlying purposes of Rule 23(b)(3) class
12 actions squarely align with the goals of the Foundation. Moreover, the proposal in the
13 Amended Petition would make it possible to pursue some claims that would not
14 otherwise be pursued, for reasons including the inefficiency or difficulty of litigating
15 small claims, thus contributing to the goals and purposes of Rule 23(b)(3).

16 **Conclusion**

17 For the foregoing reasons, the State Bar respectfully asks the Court to approve
18 the change proposed in the Amended Petition to Amend Rule 23 of the Arizona Rules
19 of Civil Procedure 23, Petition No. R-15-0007.

20 RESPECTFULLY SUBMITTED this 4th day of May, 2015.

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John A. Furlong
General Counsel

25 Electronic copy filed with the
26 Clerk of the Arizona Supreme Court
27 this 18th day of May, 2015.

28 by: 